

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000680-001 DT

03/10/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

MET AT FILLMORE APARTMENTS, THE

ANDREW M HULL

v.

JAMES SICARD (001)  
SYLVIA DEMSKE (001)

PETER STROJNIK

PHX JUSTICE CT-E1  
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

The facts in this case are not disputed. On September 28, 2001, Appellants, James Sicard & Sylvia Demske, entered into a residential lease agreement with Appellee, The Met at Fillmore Apartments. A provision of the lease agreement entitled "Rent Payment" read as follows:

If resident, for any reason, fails to honor the full term of this rental agreement, the resident agrees to pay management a lease break fee equal to two months' rent as determined by the current monthly rent resident is paying. The lease break fee is in addition to any other damages management may be entitled to by reason of breaking the lease. Resident has read and agrees to said **penalty fee**. [emphasis added]

Appellant breached the lease two months before the lease expired and paid 2 months' rent, minus a security deposit. However, Appellants contested the penalty fee (equal to two months rent - \$1,710.00). The lower court granted Appellee's Motion for Summary Judgment, awarding the penalty fee as found in the lease agreement. Appellant now brings the matter before this court.

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The only issue to be addressed is whether Appellee's lease break fee constitutes a penalty or liquidated damages. "Whether a stipulation is for liquidated damages or a penalty is a question of law for the court."<sup>1</sup> In Arizona, a breach penalty provision in a contract is unenforceable.<sup>2</sup>

[P]arties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other ground and **a term providing such a penalty is unenforceable on the grounds of public policy.**<sup>3</sup> [emphasis added]

In Arizona, there is a test to determine whether a provision fixes a penalty for breach or liquidated damages:

[The test] is whether payment is for a fixed amount or varies with the nature and extent of the breach, which means that an agreement made in advance of a breach is a penalty unless both of two conditions are met. First, the amount fixed in the contract must be a reasonable forecast of just compensation for the harm that is caused by any breach. Second, the harm that is caused by any breach must be one that is incapable or very difficult of accurate estimation.<sup>4</sup>

There is no evidence in the record to support the reasonableness of the forecasted harm or the difficulty of an accurate estimation of potential harm. Nevertheless, this test is unnecessary in the case at hand, as the very contract provision in question makes it unequivocal that the fee at issue is a penalty for breach of contract, and not liquidated damages:

If resident, for any reason, fails to honor the full term of this rental agreement, the resident agrees to pay management a lease break fee equal to two months' rent ...Resident has read and agrees to said **penalty fee.** [emphasis added]

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<sup>1</sup> *Pima Savings & Loan Ass'n v. Rampello*, 168 Ariz. 297, 300, 812 P.2d 1115, 1118 (App. 1991); See also *Marcam Mortg. Corp. v. Black*, 686 P.2d 575 (Wyo. 1984).

<sup>2</sup> *Pima Savings & Loan Ass'n v. Rampello*, 168 Ariz. at 299, 812 P.2d at 1117.

<sup>3</sup> *Id.* at 299-300, 812 P.2d at 1117-18; See *Restatement (Second) of Contracts* § 356, comment *a* (1981).

<sup>4</sup> *Pima Savings & Loan Ass'n v. Rampello*, 168 Ariz. at 300, 812 P.2d at 1118; See also *Larson-Hegstrom & Associates, Inc. v. Jeffries*, 145 Ariz. 329, 701 P.2d 587 (App.1985).

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After a careful examination of Arizona law and the record in this case, I find that a landlord imposed a penalty fee for breach of the contract, which is unenforceable as a matter of law. Although I am extremely reluctant to disturb the lower court's *factual* findings, I will not hesitate to correct *legal* error.

IT IS THEREFORE ORDERED reversing the decision of the East Phoenix #1 Justice Court, granting Appellee's Motion for Summary Judgment.

IT IS FURTHER ORDERED remanding this matter back to the East Phoenix #1 Justice Court with instructions to enter a judgment for Appellants on Appellee's Motion for Summary Judgment regarding the issue of the penalty fee, and for all further, if any, and future proceedings, with the exception of attorneys and fees and cost incurred on appeal.

IT IS FURTHER ORDERED that counsel for Appellants shall lodge a judgment consistent with this opinion, together with his application for attorneys fees and costs, no later than April 20, 2004.